Supreme Court, U.S.
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In The

Supreme Court of the United States

HEMA MENON,

Petitioner,

vs.

LAWRENCE FRINTON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Is the existence of probable cause a defense to a suit against a police officer alleging that he made an arrest to retaliate against the arrestee for her prior exercise of protected First Amendment rights or to discriminate against her because of her ethnicity?

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Hema Menon, petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit was rendered on February 25, 2002, and was not published. It is printed as Appendix A to this petition. The opinion of the United States District Court for the District of Connecticut upon which the Court of Appeals based its ruling was rendered on March 30, 2001. It was published at 170 F. Supp. 2d 190. It is printed as Appendix B to this petition.

JURISDICTION

The United States Court of Appeals for the Second Circuit rendered its decision on the petitioner's appeal on February 25, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press;

or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 provides, in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

The petitioner is a woman of obvious Asian extraction, who speaks with a heavy accent and is shorter in stature

than most of her neighbors in Fairfield County, Connecticut. In 1990 she was involved in an automobile accident with the wife of a police officer. The other party clearly was at fault in the accident but the Respondent, who investigated that accident, protected his brother officer's wife by preparing an accident report which made it appear that the fault was the Petitioner's. She filed a complaint against him and also complained to his face about what she contended was biased police work.

Some years later, the Petitioner again was involved in a traffic accident and again the Respondent investigated. As before, the other party was caucasian. Although the evidence is in dispute, the plaintiff contended that he obviously recognized her, ridiculed her speech and stature, and prepared an inaccurate report which incorrectly made it appear that she was at fault in the collision and charged her with criminal violation of state motor vehicle statutes. The charge brought against her was promptly dropped by the prosecuting attorney.

Petitioner sued, contending that her arrest was motivated by her ethnicity and/or by a desire to retaliate against her for her previous complaints concerning the Respondent's allegedly biased enforcement of the law.

The Respondent moved for summary judgment on the ground of qualified immunity, asserting that a reasonable police officer could have believed that there was probable cause for the Petitioner's arrest. The district court held that it was objectively reasonable for the Respondent to believe that probable cause existed for the Petitioner's arrest and, awarding him qualified immunity, granted summary judgment in his favor.

On appeal, the Court of Appeals held that an objectively reasonable belief in the existence of probable cause defeats a claim of retaliatory or biased enforcement of the law.

REASONS FOR GRANTING THE WRIT

The Existence Of Probable Cause Is No Defense To A Suit Against A Police Officer Alleging That He Arrested The Victim In Retaliation For Her Prior Exercise Of Protected First Amendment Rights Or Because Of Her Ethnicity

This court has long held that a selective enforcement claim may be available even if there is probable cause to make an arrest. See *Wayte v. United States*, 470 U.S. 598, 607 (1985); *Oyler v. Boles*, 368 U.S. 448, 455-56 (1962).

Other cases, holding that the presence of a discriminatory motive is irrelevant to a Fourth Amendment claim for false arrest, do not have any bearing upon suits like this one which, although arising out of arrests, are based upon other constitutional provisions. See *Whren v. United States*, 517 U.S. 806 (1996).

The Courts of Appeals have not hesitated in the past to apply this doctrine in both First Amendment cases and Equal Protection cases. See, *e.g.*, *Johnson v. Bax*, 63 F.3d 154, 159 (2d Cir. 1995) (Newman, J.); *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997) (Boggs, J.); *Futernick v. Sumpter Township*, 78 F.3d 1051 (6th Cir. 1996) (Boggs, J.)

In this case, the evidence before the district court when it considered the Respondent's summary judgment motion established by stipulation that the Respondent is a police officer charged with enforcing the traffic laws, that he investigated the 1990 accident and interviewed both drivers and that he found the Petitioner at fault but did not issue her a summons. It was stipulated further that the Petitioner thereafter filed her report with the Connecticut Department of Motor Vehicles; that she was involved in a second accident on February 20, 1996, which also was investigated by the Respondent; that she told the Respondent that she had been driving behind the other car involved; and that the Respondent thereupon charged her with violating Section 14-240 of the Connecticut General Statutes.[1] Jt. App. pp. 20-21, 73. The Petitioner also provided the court with evidence supporting the following additional facts:

1. She presently is engaged in litigation against the party involved in the incident which is the subject of this litigation. Jt. App. p. 81.

2. She was born in Malaysia and is a United States citizen. Jt. App. p. 83.

3. The accident occurred on a street which has two lanes in each direction. Jt. App. p. 93.

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[1] Section 14-240(a) provides: "No driver of a motor vehicle shall follow another vehicle more closely than is reasonable and prudent, having regard for the speed of such vehicles, the traffic upon and the condition of the highway and weather conditions."

4. Of those two lanes, one is a shoulder. Jt. App. p. 94.

5. After the accident, the other party moved her car before the police arrived. Jt. App. p. 96.

6. There was a witness to the accident riding in the Petitioner's car. Jt. App. p. 96.

7. The Petitioner told the Respondent, when he arrived to investigate the accident, about the witness. Jt. App. p. 97.

8. The Respondent did not carefully examine the damage to the Petitioner's car when he investigated the accident although he could have done so. Jt. App. pp. 99-100.

9. The Petitioner's car sustained damage not only to the front left of the vehicle but also to the front center of the vehicle. Jt. App. pp. 100-01.

10. The Petitioner explained to the Respondent that the other party was taking a left turn in front of her prior to the accident. Jt. App. p. 101.

11. The other party was driving at a speed of approximately fifty miles per hour at the time she made that turn. Jt. App. pp. 101-02.

12. After the accident, the Petitioner's car came to rest only partially on the right shoulder of the road. Jt. App. p. 103.

13. The Petitioner's car was hit hard enough to shake her up vigorously. Jt. App. p. 105.

14. The other party did not have either her headlights or her turn signal on when she hit the Petitioner. Jt. App. pp. 106-07.

15. The diagram of the accident drawn by the Respondent clearly was inaccurate, because the obvious damage could not have been caused had the collision occurred that way. Jt. App. pp. 118-20.

16. The Respondent's diagram of the 1990 accident also was incorrect. Jt. App. p. 128. In that report he falsely asserted that the left front of the Petitioner's car and the right rear of the other driver's car had suffered damage. Jt. App. pp. 130-31.

17. The Petitioner complained to the Motor Vehicle Department about the Respondent's handling of the 1990 investigation. Jt. App. p. 133.

18. The day following the 1990 accident, the Petitioner personally complained to the Respondent about his handling of that matter. Jt. App. p. 135.

19. At the scene of the 1996 accident, the Respondent yelled at the plaintiff, ridiculed her, laughed at her, and walked away from her when she tried to explain how the accident had happened. Jt. App. p. 140.

20. At that time, the Respondent also mocked and laughed at the Petitioner because of her short stature in comparison to the other party. Jt. App. p. 141. He also mocked the Petitioner's manner of speaking English. Jt. App. p. 142.

21. The other party involved in the 1990 accident was married to a police officer and communicated that fact to the Respondent. The Petitioner reported these facts to

the Department of Motor Vehicles in writing at that time. Jt. App. pp. 71-72.

The Court of Appeals rejected this evidence, as had the district court, holding that a reasonable police officer could have believed there was probable cause to charge the Petitioner and that, if there was probable cause, that was the end of the inquiry respecting Petitioner's First Amendment and Equal Protection claims. That ruling was contrary to the established law of this court and of other Courts of Appeals.

Certiorari should be granted to clarify that the qualified immunity defense, while applicable to all Section 1983 actions, does not provide an excuse for violating the First Amendment or Equal Protection rights of arrestees merely because there may have been probable cause for an arrest.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HEMA MENON, Petitioner

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APPENDIX A

CONN/NHCT
99-cv-247
Nevas

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of February two thousand and two.

PRESENT:

HON. ROBERT D. SACK,
HON. BARRINGTON D. PARKER, JR.,
HON. JOHN R. GIBSON,*

Circuit Judges.

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* Of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

HEMA MENON,

Plaintiff-Appellant,

-v-

No. 01-7639
(Filed Feb. 25, 2002)

LAWRENCE FRINTON,

Defendant-Appellee.

Appearing for Appellant:

NORMAN A. PATTIS (John R. Williams, of counsel), New Haven, CT.

Appearing for Appellee:

THOMAS GERARDE (John J. Radshaw III, of counsel), Hartford, CT.

Appeal from United States District Court for the District of Connecticut (Alan H. Nevas, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of April 20, 2001 be, and it hereby is, AFFIRMED.

Hema Menon appeals from a judgment of the United States District Court for the District of Connecticut (Alan H. Nevas, *Judge*) dismissing on a Fed. R. Civ. P. 56(c) motion for summary judgment her 42 U.S.C. § 1983 claims of *inter alia* First and Fourth Amendment violations against Lawrence Frinton in his individual capacity. We affirm.

On February 20, 1996, Menon, Malaysian in ethnicity and a United States citizen, was involved in an automobile accident with another driver. Frinton, a Danbury police officer, arrived on the scene and investigated the accident. Frinton had previously investigated another incident in which Menon was involved on March 3, 1990. During this second accident in 1996, Frinton interviewed both drivers and examined the damage to both cars. Menon told Frinton that she was traveling behind the first driver. The other driver told Frinton that she was turning right when Menon, driving on the shoulder of the road, struck her. Based on these interviews and the vehicles' damage, Frinton determined that Menon had been following the other vehicle too closely in violation of Connecticut law, and was therefore responsible for the accident. He issued a citation to her.

An officer has qualified immunity to make an arrest and similarly to issue a citation "if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met." *Lee v. Sandberg*, 136 F.3d 94, 102 (2d Cir. 1997). Probable cause exists when an arresting officer has "knowledge or reasonably trustworthy information sufficient to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested." *O'Neill v. Town of Babylon*, 986 F.2d 646, 649-50 (2d Cir. 1993) (citation omitted).

Frinton is entitled to qualified immunity because his investigation of the 1996 accident provided probable cause to issue the citation and find Menon at fault: Menon's admission, the other driver's account, and the damage to

the cars furnished Frinton with sufficient information to make such a determination.

Menon insists that Frinton failed to interview a passenger in her car and retaliated for Menon's complaints regarding Frinton's conduct and determinations during the 1990 accident. Neither these facts nor any of the additional facts listed in Menon's brief cast doubt on the objective reasonableness of Frinton's conduct. That Frinton failed to interview Menon's companion supports no reasonable inference that would negate his entitlement to immunity. Further, Menon proffers no evidence other than speculation to demonstrate that Frinton recognized Menon, remembered the 1990 accident, or acted maliciously and in violation of her constitutional rights. Speculative assertions of fact absent factual support do not merit reversal of summary judgment. *See Carey v. Crescenzi*, 923 F.2d 18, 21 (2d Cir. 1991).

For the foregoing reasons, the judgment of the District Court is hereby AFFIRMED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

/s/ Lucille Carr 2/25/02
By: Date

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

HEMA MENON	:	CASE NO.
V.	:	3:99CV247 (AHN)
LAWRENCE FRINTON	:	(Filed Mar. 30, 2001)

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The plaintiff, Hema Menon ("Menon"), brings this 42 U.S.C. § 1983 action against the defendant, Lawrence Frinton ("Frinton"). Menon alleges violations of her rights under the first, fourth and fourteenth amendments to the United States Constitution. She also asserts a state law claim of intentional infliction of emotional distress.

Now pending before the court is Frinton's Motion for Summary Judgment [doc. # 13]. For the reasons that follow, the motion is GRANTED.

STANDARD OF REVIEW

A motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact to be tried and that the moving party is entitled to judgment as a matter of law. *See* Rule 56(c), Fed. R. Civ. P.; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The substantive law governing the case identifies those facts that are material on a motion for summary judgment. *See Anderson*, 477 U.S. at 248. A

dispute regarding a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 523 (2d Cir. 1992) (citation and internal quotation marks omitted). The party seeking summary judgment bears the burden of showing that no genuine dispute about an issue of material fact exists. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The court must draw all factual inferences and assertions in favor of the party opposing summary judgment. *See Lee v. Sandberg*, 136 F.3d 94, 102 (2d Cir. 1997).

Summary judgment dismissing a claim based upon a defense of qualified immunity may be granted if the court finds that the "asserted rights were not clearly established, or if the evidence is such that, even when it is viewed in the light most favorable to the plaintiffs and with all permissible inferences drawn in their favor, no rational jury could fail to conclude that it was objectively reasonable for the defendants to believe that they were acting in a fashion that did not violate a clearly established right." *In Re State Police Litigation*, 88 F.3d 111, 123 (2d Cir. 1996). If a reasonable trier of fact could find that the defendant's actions were objectively unreasonable, then the defendants are not entitled to summary judgment. *See Lennon v. Miller*, 66 F.3d 416, 421 (1995). In cases where the defense alleges qualified immunity, the courts are not concerned with the correctness of the defendant's conduct, but rather the objective reasonableness of their actions in light of the circumstances confronting them at the scene. *Id.*

FACTS

The following facts are undisputed. Frinton was employed as a police officer by the City of Danbury. *See* Defendants' 9(c)(1) Statement of Undisputed Facts ¶ 1. [hereinafter "Defs.' Stat."] and Plaintiff's 9(c)(2) Statement ¶ 1 [hereinafter Pl.'s Stat."]. As a police officer, Frinton has the authority to enforce the traffic laws of the State of Connecticut. *See* Defs.' Stat. ¶ 2 and Pl.'s Stat. ¶ 2. On March 3, 1990, Frinton was called to investigate a traffic accident involving Menon and Gale McNamara ("McNamara") in Danbury, Connecticut. *See* Defs.' Stat. ¶ 3 and Pl.'s Stat. ¶ 3. Frinton interviewed both drivers regarding the accident. *See* Defs.' Stat. ¶ 4 and Pl.'s Stat. ¶ 4. Frinton determined that Menon was at fault, but did not issue her a summons. *See* Defs.' Stat. ¶ 5 and Pl.'s Stat. ¶ 5. Menon believed that Frinton's conclusion that she was at fault was not based upon the results of his investigation, but was the result of bias because McNamara was the wife of a fellow police officer. On May 9, 1990, Menon filed an accident report with the Connecticut Department of Motor Vehicles ("DMV"). *See* Defs.' Stat. ¶ 6 and Pl.'s Stat. ¶ 6. In her report, Menon explained her version of the accident and claimed that Frinton was biased against her.

Six years later, on February 20, 1996, Menon was involved in a motor vehicle accident with Ann Dux ("Dux") in Danbury, Connecticut. *See* Defs.' Stat. ¶ 7 and Pl.'s Stat. ¶ 7. By chance, Frinton also investigated this accident. *See* Defs.' Stat. ¶ 8 and Pl.'s Stat. ¶ 8. During Frinton's investigation, Menon told him that she was traveling behind Dux before the accident occurred. *See* Defs.' Stat. ¶ 9 and Pl.'s Stat. ¶ 9. Frinton interviewed the drivers, analyzed the damage to the vehicles,

and concluded that Menon was at fault. He charged her with following too closely in violation of Connecticut General Statutes § 14-240. *See* Defs.' Stat. ¶ 10 and Pl.'s Stat. ¶ 10. Menon believes that Frinton's conclusion that she was at fault was not based upon the facts, but on his desire to retaliate against her for filing a complaint against him six years earlier. Frinton maintains that at the time of the 1996 accident he had no recollection of Menon or the accident that had occurred six years earlier. *See* Defendant's Memorandum of Law ("Def's Mem.") Exhibit A, ¶¶ 10, 11.

DISCUSSION

Menon claims that Frinton (1) violated her right to be free from false arrest and malicious prosecution as guaranteed by the Fourth Amendment; (2) found her at fault in the 1996 accident in retaliation for her complaint against him to the Department of Motor Vehicles in 1990; (3) violated her equal protection rights under the Fourteenth Amendment; (4) violated her First Amendment right to freedom of speech, freedom to petition the government for redress of grievances, and right to access to the courts; and (5) violated Connecticut law by intentionally inflicting emotional distress.

Frinton maintains that he is entitled to summary judgment because (1) his actions during the March 3, 1990, and February 20, 1996, motor vehicle accidents were objectively reasonable; (2) there is no evidence of improper motive supporting a retaliation claim; (3) there is no evidence of discriminatory conduct supporting an equal protection claim; and (4) the claim for intentional infliction of emotional distress does not satisfy the extreme and outrageous standard. The court agrees.

I. Qualified Immunity

Menon alleges that Frinton violated her right to be free from false arrest and malicious prosecution in violation of the Fourth Amendment in connection with his investigation of the two automobile accidents and issuance of a summons for a motor vehicle violation. Frinton asserts that he is entitled to qualified immunity for these claims based upon the "objective reasonableness" of his actions.

"Qualified immunity serves important interests in our political system." *Sound Aircraft Servs., Inc. v. Town of East Hampton*, 192 F.3d 329, 333 (2d Cir. 1999). Qualified immunity shields government officials from liability for civil damages as a result of their performance of discretionary functions, and serves to protect government officials from the burdens of costly, but insubstantial, lawsuits. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). The doctrine of qualified immunity entitles public officials to freedom from suits for acts performed in their official capacity if "(1) their conduct does not violate clearly established constitutional rights, or (2) it was objectively reasonable for them to believe their acts did not violate those rights." *Martinez v. Simonetti*, 202 F.3d 625, 633-34 (2d Cir. 2000) (quoting *Wevant v. Okst*, 101 F.3d 845 (2d Cir. 1996)). Even where the plaintiff's federal rights and the scope of the official's permissible conduct are clearly established, the qualified immunity defense protects a government actor if it was "objectively reasonable" for him to believe that his actions were lawful at the time of the challenged act. *See Lennon*, 66 F.3d at 421. The objective reasonableness test is met and a defendant is entitled to qualified immunity if "officers of reasonable competence would disagree" on the legality of the defendant's conduct. *See Malley v. Briggs*, 475 U.S. 335, 340-341 (1986).

Here, because it is clearly established that in individual may not be arrested or issued a motor vehicle summons without probable cause, *see Lee*, 136 F.3d at 102, the success of Frinton's claim of qualified immunity depends on whether his actions were supported by probable cause and whether his conduct in making that determination was objectively reasonable. *See Robison v. Via*, 821 F.2d 913, 921 (2d Cir. 1987) (holding that qualified immunity is appropriate if officers of reasonable competence could disagree on whether the probable cause test was met).

For the purpose of the qualified immunity analysis within the context of a claim such as the one asserted here, the court considers only the facts that were available to the police officer, or could have been perceived by him at the time he engaged in the challenged conduct. *Cf. Lowth v. Town of Cheektowaga*, 82 F.3d 563, 567 (1996). "The existence of probable cause must be determined on the basis of the totality of the circumstances." *Harford v. County of Broom*, 102 F. Supp. 2d 85, 92 (N.D.N.Y. 2000). *See also Moore v. Comesanas*, 32 F.3d 670, 673 (2d Cir. 1994) (holding that where the existence of probable cause is predominantly factual in nature, it is properly presented to the jury).

Based on the totality of the undisputed facts, the court finds that it was objectively reasonable for Frinton to believe that probable cause existed to find Menon responsible for the 1990 and 1996 car accidents. In both accidents, Frinton's conclusions were based on his analysis of the facts as he observed them at the scene, including the damage to each vehicle and the statements of both drivers. In particular, with regard to the 1996 accident, Frinton relied on Menon's admission that she was traveling behind Dux. It is clear that officers of reasonable competence could disagree that Menon's admission, together with the

other evidence, was sufficient to find probable cause that Menon violated C.G.S. 14-240. There is absolutely no evidence that Frinton was influenced by the fact that the other driver involved in the 1990 accident was the wife of a police officer or that this fact played any part in Frinton's probable cause determination.

Because Frinton had probable cause to issue the summons to Menon, he did not violate a clearly established constitutional right and his conduct was objectively reasonable. Accordingly, Frinton is entitled to qualified immunity on Menon's false arrest and malicious prosecution claims as a matter of law.

Based on this conclusion, Frinton is also entitled to qualified immunity on Menon's claim that his conduct violated her First Amendment right to freedom of speech, freedom to petition the government for redress of grievances, and her right of access to the courts.

II. Retaliation

There is also no evidence to support Menon's allegation that Frinton found her at fault in the 1996 accident in retaliation for the bias complaint she filed against him in 1990. Menon's conclusory allegations of retaliation and improper motive are not sufficient to defeat Frinton's qualified immunity defense.

"In order to state a valid due process claim for retaliation, a plaintiff must allege that he or she engaged in conduct that was constitutionally protected and that retaliation against the protected conduct was a 'substantial' or 'motivating' factor in the defendant's actions." *Blue v. Koren*, 72 F.3d 1075, 1082 (2d Cir. 1995). On a "motion for summary judgment asserting a qualified immunity

defense in an action in which an official's conduct is objectively reasonable but an unconstitutional subjective intent is alleged, the plaintiff must proffer particularized evidence of direct or circumstantial facts, as suggested in Justice Kennedy's concurrence in *Siegert*, 500 U.S. at 236, supporting the claim of an improper motive in order to avoid summary judgment." *Id.* at 1084. *See also Hemphill v. Schott*, 141 F.3d 412, 420 (2d Cir. 1998); *Ford v. Moore*, 237 F.3d 156, 162 (2d Cir. 2001). This evidence may include "expressions by the officials involved regarding their state of mind, circumstances suggesting in a substantial fashion that the plaintiff has been singled out, or the highly unusual nature of the actions taken." *Id.* Lastly, "a conclusory proffer of an unconstitutional motive should not defeat the motion for summary judgment." *Id.*

Herein, Menon does not submit any particular facts supporting her allegation of retaliation. She merely alleges that Frinton's conclusion that she was at fault was not based upon the results of his investigation, but was tainted by his desire to seek revenge for the bias complaint she filed against him six years earlier. In contrast to this conclusory allegation, the record evidence supports a finding that Frinton conducted a proper investigation that was not tainted in any way. Menon stated in her deposition that Frinton never mentioned the 1990 accident while he was investigating the 1996 accident. Def's Mem., Exhibit E, pg. 29. Moreover, there is nothing to contradict or discredit Frinton's assertion that he had no prior recollection of Menon or of the routine motor vehicle accident that had occurred six years earlier. Def's Mem., Exhibit A, ¶¶ 10, 11. Menon submits no evidence that Frinton made any inappropriate statements or remarks that could reveal an improper motive, or that he inappropriately singled her out, or that he took any unusual

actions at all during the course of his investigation. Menon's failure to proffer any particularized evidence of the claimed improper motive is fatal to her retaliation claim.

III. Equal Protection

Although Menon initially claimed that she was discriminated against on the basis of her race, she has since acknowledged that there is no evidence of racial or ethnic bias. Nonetheless, she maintains that the fact that she was found responsible for both accidents is sufficient evidence that Frinton acted maliciously or with bad faith. This claim is without merit.

The Equal Protection Clause of the Fourteenth Amendment directs that similarly situated persons be treated alike. *See Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). In order to establish an Equal Protection violation based upon selective enforcement, the plaintiff must prove that (1) in comparison with others similarly situated, she was selectively treated, and (2) that such selective treatment was based on impermissible conditions such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person. *See Diesel v. Town of Lewisboro*, 232 F.3d 92, 103 (2d Cir. 2000); *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 16 (2d Cir. 1999); *La Trieste Restaurant & Cabaret, Inc. v. Village of Portchester*, 40 F.3d 587, 590 (2d Cir. 1994); *FSK Drug Corp. v. Perales*, 960 F.2d 6, 10 (2d Cir. 1992).

Menon offers no evidence or explanation of how she was treated differently than any other another [sic] similarly-situated individual. Further, Menon acknowledges that Frinton did not make any statements to her

suggesting bias based upon her national origin. Her claim is apparently based solely on the fact that Frinton found her responsible for both the 1990 and 1996 accidents. This speculation and conjecture does not establish an equal protection claim.

IV. Intentional Infliction of Emotional Distress

Finally, the Court agrees with Frinton's claim that Menon's intentional infliction of emotional distress claim must fail because his conduct was not extreme and outrageous as a matter of law.

In order to prevail on a claim for intentional infliction of emotional distress the plaintiff must allege that: (1) the defendant intended or knew that emotional distress would likely result from its conduct; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's conduct caused plaintiff distress; and (4) plaintiff's distress was severe. *See Petyan v. Ellis*, 200 Conn. 243, 253, 510 A.2d 1337 (1986). The disputed conduct must exceed all bounds tolerated by decent society, and cannot be merely rude, tactless or insulting. *See Petyan*, 200 Conn. at 254 (1986).[1] Whether a defendant's conduct is sufficient to satisfy the requirement that it be extreme and outrageous is initially a question for the court to determine. *See Johnson v. Chesebrough-Pond's USA Co.*, 918 F. Supp. 543, 552 (D.

[1] "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" 1 Restatement (Second), Torts § 46, comment (d), p. 73 (1965).

Conn. 1996); *see also Bell v. Board of Education*, 55 Conn. App. 400, 410, 739 A.2d 321 (1999). Only where reasonable minds disagree does it become an issue for the jury. *Bell* at 55 Conn. App. 410. (1999). There is no bright line rule to determine what constitutes extreme and outrageous conduct sufficient to maintain an action as the court must look to the specific facts and circumstances of each case in making its decisions." *Rhonda Craddock v. Church Community Supported Living Association*, No. 990592711S, 2000 Conn. Super. LEXIS 3008 (Conn. Super. Ct. November 13, 2000). "If a defendant's conduct is merely insulting, displays bad taste, or results in hurt feelings or embarrassment, the claim is generally dismissed as a matter of law." *Cowras v. Hard Copy*, 56 F. Supp. 2d 207, 210 (D. Conn. 1999).

Here, Menon has not alleged any facts which satisfy the requisite standard of extreme and outrageous conduct. The average member of the community would not find Frinton's acts in investigating routine traffic accidents and attributing fault to one of the drivers to be extreme and outrageous. Menon has failed to present any facts to satisfy the requirement of extreme and outrageous conduct to sustain a claim of intentional infliction of emotional distress.

CONCLUSION

Based on the foregoing analysis, the defendant's motion for summary judgment [doc. # 13] is GRANTED. The Clerk of the Court is ordered to enter judgment in favor of the defendant and to close the case.

SO ORDERED this 30 day of March, 2001, at Bridgeport, Connecticut.

/s/ Alan H. Nevas
Alan H. Nevas
United States District Judge

Supreme Court, U.S.
FILED
JUN 19 2002
OFFICE OF THE CLERK

(2)

No. 01-1697

IN THE

Supreme Court of the United States

HEMA MENON,

Petitioner,

v.

LAWRENCE FRINTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The petitioner was involved in two motor vehicle accidents in Danbury, Connecticut, both of which were investigated by Officer Frinton. J.A. 44-47, Affidavit of L. Frinton. The first accident occurred on March 13, 1990, at the intersection of Kalian Drive and Judith Drive. *Id.* Officer Frinton completed a police accident report as part of his investigation. J.A. 48-9. Based on Officer Frinton's investigation at the scene of that accident, he found probable cause existed that the petitioner, Ms. Menon, caused the 1990 accident. J.A. 44-47, 48-49. Petitioner can hardly dispute this finding of fault as she was stopped at a stop sign, pulled forward into traffic, and struck a car approaching from her left that had the right of way. J.A. 48-49. Officer Frinton did not issue a citation to the petitioner as a result of the accident. This certainly represents fair treatment by Officer Frinton. The petitioner thereafter reported the 1990 accident to the Department of Motor Vehicles, as was her duty under law. J.A. 66-72. There is no evidence Officer Frinton ever saw this report. J.A. 45.

Six years later, on February 20, 1996, the petitioner was involved in a second motor vehicle accident, with Ann Dux, on Lake Avenue Extension in Danbury, Connecticut that, coincidentally, was also investigated by Officer Frinton. J.A. 44-47, Affidavit of L. Frinton. As a result of his investigation of the 1996 accident, Officer Frinton found probable cause that the petitioner violated Conn. Gen. Stat. § 14-240 of the motor vehicle traffic laws, issued her a summons and completed a police accident report. J.A. 44-47, 50-51. It is undisputed that petitioner told Officer Frinton she had been traveling behind Ms. Dux prior to the accident, which justified his issuance of a ticket for "following too

close" in violation of Conn. Gen. Stat. § 14-240. J.A. 33-34. Petitioner also admits that Officer Frinton examined the damage to both vehicles before determining fault. J.A. 31-33. Thereafter, he filed a supplemental report, reaffirming his finding that probable cause existed for the violation. J.A. 52-53

The petitioner, Hema Menon, filed this § 1983 action by Complaint dated February 16, 1999 against Officer Lawrence Frinton, in his individual capacity only. J.A. 7-13. The petitioner claimed violations of her First Amendment right to freedom of speech and freedom to petition the government for redress of grievances. *Id.* The petitioner further alleged Officer Frinton violated her Fourth and Fourteenth Amendment rights in that the petitioner was falsely accused of a violation of the motor vehicle laws, Conn. Gen. Stat. § 14-240, following too closely, and alleged a cause of action for malicious prosecution at common law. *Id.* The petitioner claims Officer Frinton retaliated against her in violation of her due process rights and also asserted a violation of the Equal Protection clause. *Id.* Finally, the petitioner claimed Officer Frinton "violated her right to be free from reckless or intentional infliction of severe emotional distress as guaranteed by Connecticut law".

The District Court, Nevas, J., found that Officer Frinton had probable cause to issue the appellant a summons after the second accident and, as such, found him to enjoy qualified immunity because his investigation and actions were objectively reasonable under the circumstances then and there existing. The District Court also found that Officer Frinton was entitled to summary judgment on the appellant's retaliation claim because his investigation of the 1996 accident was objectively reasonable and the petitioner has

presented no evidence of improper motive. Similarly, the District Court concluded that the petitioner had failed to produce any significant, probative evidence of a violation of the Equal Protection Clause. The District Court found no deprivation of any constitutional right, freedom of speech or otherwise. Moreover, as a matter of law, the District Court concluded that Officer Frinton's actions did not constitute intentional infliction of emotional distress.

The United States Court of Appeals for the Second Circuit affirmed the District Court. Respondent submits this honorable Court should deny the petitioner's Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals and the decision of District Court demonstrate that the Petitioner failed to carry her burden opposing summary judgment and her claims were properly dismissed. The decision of the District Court properly examined the evidence submitted by the parties and did not find a dispute as to a fact material to the disposition of the case. *See* Petition, App. p. 4, 11-13.

At summary judgment, after the moving party has met its burden to demonstrate that there is no dispute as to any material fact, the non-moving party has the obligation to bring forward significant, probative evidence, which would be admissible at trial to demonstrate the existence of any dispute. If the non-moving party submits evidence that is "merely colorable," or "is not significantly probative," summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

Although the moving party bears the initial burden of establishing that there are no genuine issues of material fact, once such a showing is made, the non-movant must "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. Unsupported allegations do not create a material issue of fact. *See Goenaga v. March of Dimes Birth Defects Fund*, 51 F.3d 14, 18 (2d Cir. 1995); *see also Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir. 1991), *cert. denied*, 502 U.S. 849, 112 S. Ct. 152, 116 L. Ed. 2d 117 (1991).

Once the moving party has carried its burden under Rule 56(c), "the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The motion "will not be defeated merely . . . on the basis of conjecture or surmise." *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir. 1991), *cert. denied*, 502 U.S. 849, 112 S. Ct. 152, 116 L. Ed. 2d 117 (1991). The party opposing summary judgment may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible, *L & L Started Pullets, Inc. v. Gourdine*, 762 F.2d 1, 3-4 (2d Cir. 1985); *Wyler v. United States*, 725 F.2d 156, 160 (2d Cir. 1983); *Curl v. IBM Corp.*, 517 F.2d 212, 214 (5th Cir. 1975), *cert. denied*, 425 U.S. 943, 96 S. Ct. 1683, 48 L. Ed. 2d 187 (1976), or "upon the mere allegations or denials of the adverse party's pleading," Fed. R. Civ. P. 56(e). Similarly, unsworn statements of the parties, letters addressed to litigants from third persons, and hearsay which does not fall under one or more of the exceptions listed in Rules 803-805 of the Federal Rules of Evidence, may not properly be considered. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); *Beyene v. Coleman*

Security Services, Inc., 854 F.2d 1179 (9th Cir. 1988); *Edward B. Marks Music Corp. v. Stasny Music Corp.*, 1 F.R.D. 720 (S.D.N.Y. 1941).

A cursory review of the Petition indicates that Menon is doing exactly what this Court has cautioned against in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). At page 3 of the petition, the petitioner claims the "evidence is in dispute," however, the court specifically found that the petitioner proffered no competent evidence to meet the evidence provided by the moving party at summary judgment. The petitioner's representation that the respondent "recognized her, ridiculed her speech and stature" is plainly false. At page 5 of the petition, the Petitioner offers portions of her deposition transcript as part of her nexus of "facts," yet the vast majority of her "facts" are culled from multi-page unsworn letters which does not constitute the kind of significant, probative evidence required to meet her burden. *See L & L Started Pullets, Inc. v. Gourdine*, 762 F.2d 1, 3-4 (2d Cir. 1985); *Wyler v. United States*, 725 F.2d 156, 160 (2d Cir. 1983); *Curl v. IBM Corp.*, 517 F.2d 212, 214 (5th Cir. 1975), *cert. denied*, 425 U.S. 943, 96 S. Ct. 1683, 48 L. Ed. 2d 187 (1976). Moreover, many of the claimed facts are not material and would make no difference in the outcome of the case. The province of the court in this instance is the determination of whether a dispute about a material fact exists. Finding no dispute, the District Court properly granted summary judgment as hundreds of courts have done on a regular basis. *See* Petition, App., p. 11-13. The Court of Appeals properly affirmed. *See* Petition, App., p. 4.

The District Court, Nevas, J., found that Officer Frinton had probable cause to issue the appellant a summons after

the second accident and, as such, found him to enjoy qualified immunity because his investigation and actions were objectively reasonable under the circumstances then and there existing. *See* Petition, App., p. 10-1. The District Court also found that Officer Frinton was entitled to summary judgment on the appellant's retaliation claim because his investigation of the 1996 accident was objectively reasonable and the plaintiff presented no evidence of improper motive.

Importantly, the Petitioner's claim that this area of the law needs "clarification" is unavailing as a reason for review by this Honorable Court. The Petitioner ignores the long-standing principle that the fact that an official's actions were objectively reasonable will in itself be evidence that there was no retaliatory motive. *Blue v. Koren*, 72 F.3d 1075, 1084 (2d Cir. 1995). "In order to state a valid due process claim for retaliation, a plaintiff must allege that he or she engaged in conduct that was constitutionally protected and that retaliation against the protected conduct was a 'substantial or motivating factor in the defendant's actions.'" *Blue v. Koren*, 72 F.3d 1075, 1082 (2d Cir. 1995). In addition, upon a motion for summary judgment based on the affirmative defense of qualified immunity, "the plaintiff must proffer particularized evidence of direct or circumstantial facts, as suggested in Justice Kennedy's concurrence in *Siegert v. Gilley*, 500 U.S. 226, at 236, 111 S. Ct. at 1795, supporting the claim of an improper motive in order to avoid summary judgment." *Blue v. Koren* at 1084. "In our view, the particularized evidence of improper motive may include expressions by the officials involved regarding their state of mind, circumstances suggesting in a substantial fashion that the plaintiff has been singled out, or the highly unusual nature of the actions taken." *Id.* That an official's actions were objectively reasonable will in itself be evidence that there was no retaliatory motive. *Id.* at 1084.

Both the District Court and the Court of Appeals recognized that the Respondent's actions and his investigation of the February 20, 1996 accident involving the plaintiff were objectively reasonable. He was called to the scene of an accident, interviewed both drivers and surveyed the damage to the vehicles. It was a routine traffic accident and was an exercise Officer Frinton had completed on hundreds of other occasions. J.A. 44-46. The only fact on which plaintiff relies for her retaliation claim seems to be that Officer Frinton previously investigated her March 13, 1990 accident. The undisputed evidence in that: (1) defendant Frinton had no knowledge of the report Menon claims she submitted to the Motor Vehicle Department after the 1990 accident (J.A. 45); and (2) that neither Menon nor Frinton mentioned the 1990 accident during the 1996 traffic stop. J.A. 35. The proffer of some evidence other than the prior event is required. *Blue v. Koren, supra*. Otherwise, "officials, who may in the course of carrying out their duties have continuing run-ins with those whose conduct the officials must monitor, will be forced to go to trial when the only evidence of unconstitutional motive may be a prior dispute with the plaintiff, if that." *Id*. The Petitioner, at most, has testified to her version of the facts and proffered these facts as the gospel truth, all without any corroborating direct evidence. *See* J.A 74-6, App. Br. 7-10, 14. The District Court found no dispute existed as to the material facts and granted the motion for summary judgment.

Nothing produced by the Petitioner constitutes the sort of significant, probative evidence required to defeat a motion for summary judgment. Disputes as to material facts are not created by conjecture or surmise. *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir. 1991), *cert. denied*, 502 U.S. 849, 112 S. Ct. 152, 116 L. Ed. 2d 117 (1991).

Similarly, the District Court concluded that the plaintiff had failed to produce any significant, probative evidence of a violation of the Equal Protection Clause. *See* Petition, Appendix, p. 13-4. The District Court found no deprivation of any constitutional right, freedom of speech or otherwise.

The Court of Appeals agreed, affirming the District Court — just as it affirms many decisions granting summary judgment where the non-moving party does not carry its burden. The Petitioner had the opportunity to meet the evidence proffered by the respondent at summary judgment yet failed to do so.

CONCLUSION

The Respondent respectfully requests the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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